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Supreme Court, U.S.
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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Respondent's "Motion to Dismiss Writ of Certiorari as Improvidently Granted" argues that the issue which the Court has identified as warranting review in this case – whether execution of a mentally retarded defendant with a 59 I.Q. violates the Eighth Amendment as incorporated into the Fourteenth – was neither raised nor decided below. This is the selfsame argument that respondent made in Point I at pages 1-3 of its *Supplement to Commonwealth's Brief in Opposition*, which the Court has already considered and rejected. Respondent's present expansion of the argument into five printed pages offers no reason to reconsider it. Respondent should not be encouraged to impose upon the Court with lengthy DIG motions after his attempts to persuade the Court by a shorter version of the same point in his BIO have failed.

In any event, respondent's point was and is wrong. Petitioner's brief in the Virginia Supreme Court was organized in a series of "Questions Presented and Argument[s]" with Question Number 1 being "Is the Sentence of Death Excessive." (*Opening Brief of Appellant* filed April 5, 2000 in the Virginia Supreme Court, page 11 [Appendix to Petition for Certiorari, page 131].) The one-page argument under that Question began with a sentence which is half quoted in respondent's DIG motion – "While the 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty on Mr. Atkins because he is mentally retarded, *Penry v. Lynaugh*, 492 U.S. 302 . . . (1989)" (*ibid.*

[Appendix, page 131], quoted without the "While" at page 4 of respondent's DIG motion) – and which then went on to argue that "whether or not the death penalty is excessive is to be judged at any given time by the 'evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958)" (*ibid.* [Appendix, page 131]). It next observed that counsel could find no cases in which a person with a 59 I.Q. had been sentenced to death in Virginia, and that "[w]hile this Court [the Virginia Supreme Court] has upheld death sentences for individuals with low IQs [in the 69-70 range, citing cases] . . . , today society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole is excessive." (*Ibid.* [Appendix page 131].)

Plainly, petitioner was invoking both the federal Eighth Amendment (explicitly) and the Virginia Supreme Court's obligation to conduct proportionality review under Va. Code § 17.1-313(C) (implicitly) in contending – exactly as McCarver contended in *McCarver v. North Carolina* – that the post-*Penry* evolution of society's standards (as reflected even in Virginia's own capital-sentencing practice) had eroded the controlling force of the *Penry* ruling, at least as to persons with retardation as severe as Daryl Atkins'. It is impossible to make any other sense of the brief's reference – twice in two paragraphs – to "evolving standards," an Eighth Amendment concept (explicitly quoted from *Trop*) which has no apparent relevancy to Virginia's statutory proportionality-review process.

We say "plainly" because even respondent's counsel did not misunderstand the point or affect not to see it.

The *Brief of the Commonwealth* in the Virginia Supreme Court described Atkins' argument on appeal as two-fold. The Commonwealth recited that Atkins was first invoking Virginia's proportionality-review jurisprudence and then, "[i]n addition, Atkins says that, for the same reasons, the Eighth Amendment's evolving standards of decency prohibit imposition of the death penalty in this case." (*Id.* at page 9 [Appendix, page 150].) The Commonwealth dealt with the proportionality-review aspect of Atkins' mental-retardation claim by recounting aggravating features of his crime and record and citing a number of "comparable" Virginia cases upholding death sentences. Then, "[r]egarding Atkins' assertion that the Eighth Amendment prohibits imposition of the death penalty on a person with a purported I.Q. of 59" (*Brief of the Commonwealth*, page 10 [Appendix, page 151]), the Commonwealth argued, *one*, that the claim was procedurally defaulted because it had not been presented to the trial court; *two*, that the evidence of Atkins' retardation "was in sharp conflict"; and, *three*, that "[i]n any event, 'execution of mentally retarded offenders contravenes neither those practices condemned at the time the Bill of Rights was adopted nor the evolving standards of decency that mark the progress of a maturing society.' *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (internal quotation marks omitted)" (*ibid.* [Appendix, page 151]).[1] A footnote to the last point says that "To the extent that Atkins argues that societal standards of decency have

[1] The Commonwealth did not assert, as it does now, that Atkins' assignments of error were insufficiently broad to encompass the Eighth Amendment claim.

evolved since *Penry* and now prohibit his execution, Atkins has offered absolutely no support for this novel proposition." (*Id.* n. 2 [Appendix page 151].)

With the issues thus submitted, the Virginia Supreme Court noted two of the Commonwealth's three responses to Atkins' Eighth Amendment argument – the Commonwealth's point that "the evidence was in conflict regarding the question whether Atkins is mentally retarded" (*Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000) [Appendix, page 25]) and the Commonwealth's contention, "[q]uoting from Penry v. Lynaugh . . . , that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency" (*id.* at 318-319 [Appendix pages 25-26]. The Virginia Supreme Court did *not* advert to Virginia's procedural-default argument, let alone rely upon it.

In short, while the terse, elliptical submission made to the Virginia Supreme Court by Atkins' counsel could have done a far better job of separately enumerating each "book and verse" relied on (*Eddings v. Oklahoma*, 455 U.S. 104, 114 n. 9 (1982)), it was sufficient to alert that court both to the Eighth Amendment aspect of his contention that death was an excessive punishment for his retarded client and to the evolving-standards-of-decency theory underlying it. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 482 n. 10 (1978). Explicitly recognizing this, the respondent below tried and failed to persuade the Virginia Supreme Court to put decision off onto a state procedural ground. Respondent should not now be heard to assert, twice belatedly, that the federal constitutional issue which it

attempted unsuccessfully to divert the Virginia Supreme Court from considering was never there in the first place.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's motion.

Respectfully submitted,

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